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In The Supreme Court of The United States

OCTOBER TERM, 1971

NO. 71-1157

LEONARD R. SHEWFELT and
IMPERIAL COUNTY LAND COMPANY

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

LEONARD R. SHEWFELT and
IMPERIAL COUNTY LAND COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 9, 1972.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The opinion is reproduced in Appendix A attached hereto. It affirmed a judgment of conviction of petitioners in the United States District Court for the Southern District of California on fourteen counts of mail fraud in violation of Title 18, United States Code, Section 1341. Petitioners were tried by a jury and there is no opinion of that court.

JURISDICTION

The judgment of the Court of Appeals below (Appendix A, infra) was entered on February 9, 1972. Rehearing was sought and is still pending. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the District Court committed reversible error when it failed to charge the jury, after appropriate request, that reliance on the advice of counsel is an element to be considered in determining whether IMPERIAL COUNTY LAND COMPANY and LEONARD R. SHEWFELT acted in good faith or with fraudulent intent.

STATEMENT OF THE CASE

At a jury trial in the United States District Court for the Southern District of California, petitioners LEONARD R. SHEWFELT (hereinafter SHEWFELT) and

IMPERIAL COUNTY LAND COMPANY (hereinafter (IMPERIAL LAND) were found guilty of fourteen counts of mail fraud, violations of Title 18, United States Code, Section 1341. SHEWFELT was sentenced to fourteen two-year prison terms, the sentences to run concurrently. IMPERIAL LAND was fined $1,000 for each count upon which it was convicted for a total of $14,000.

Petitioner IMPERIAL LAND is a California corporation which at the time of the events involved in this case was owned and controlled by petitioner SHEWFELT and one Henry Hoffman. Reporter's Transcript 391-95 (reference to the Reporter's Transcript will hereinafter be designated R. T.; references to the Clerk's Transcript will hereinafter be designated C. T.; and references to Government Exhibits will hereinafter be designated G. X.). (The prosecution of Hoffman, who was indicted as co-defendant, was severed from that of petitioners upon motion of the Government and has, as of the date of this petition, not been brought to trial.) IMPERIAL LAND was formed for the purpose of buying and selling desert land in Southern California (R. T. 393). The gravamen of the offenses of which petitioners were convicted is that petitioners improperly caused to be filed in the Superior Court of Imperial County quiet title actions on desert land located east of the Salton Sea in Imperial County, California, and that the various defendants named in the quiet title actions were misled by the complaint to quiet title and an accompanying letter in that they were led to believe that they had no interest in the property in question, and that a costly lawsuit could be avoided and a nominal sum received (from $25 to $100) if the disclaimer which was provided were executed. The theory of the defense was that the petitioners acted in good faith and relied on the

advice of their attorneys.

In the 1920's the lands in question were sold by a subsidiary of the Southern Pacific Railroad Company (the United States had granted these lands to Southern Pacific at the turn of the century) to speculators who promptly sold them to the general public in sections of approximately ten acres each. The initial transfer of the property from the U.S. Government to the Southern Pacific Railroad was based upon the original land survey in the area conducted around the year 1859 (R.T. 496). The second land survey was conducted around 1917 to 1920 (R. T. 499). The second survey revealed that the original survey was incorrect and as a result the descriptions of the individual parcels of property were erroneous and there was an overlapping of boundary lines in various property lot descriptions (R. T. 508-510). In 1930 and 1931, Imperial County removed large areas of these lands from its tax rolls because the administrative costs of their taxation was greater than the income received therefrom (R. T. 633). Thirty years later, in 1960, the tax rolls were reinstated (R. T. 633). Largely due to deaths, sales, and movings, most of the tax bills were returned, resulting in the tax delinquencies of such lands (R. T. 513, 518, 519, 527, 633). Under California law, upon failure to pay taxes assessed upon real property, after one year the property shall be sold to the state. California Revenue and Taxation Code, Section 3436. Five years after the property is sold to the state, if not redeemed by the owner, the property is tax deeded to the state. California Revenue and Taxation Code, Section 3511. Once the property has been so deeded to the state, a property owner forfeits all rights in the property except the privilege of redeeming it at any time before the state disposes of it. Mercury Herald Co. v. Moore, 22 Cal. 2d 269, 273, 138 P. 2d 673 (1943). Thus in 1966,

pursuant to California law the delinquent lands were deeded to the state of California with the former owners, or their successors in interest, retaining a privilege to pay the delinquent taxes and thus redeem the property prior to the disposition thereof by way of public auction.

In late 1966, IMPERIAL LAND, through its two shareholders, SHEWFELT and Hoffman, went to the title companies in Imperial County and, using the title company plat books, determined which parcels of property were tax delinquent and had been tax deeded to the state (R. T. 563-67, 633). They then searched the records and various other sources to determine the names and whereabouts of the last record owners, or their heirs, if the last record owner was deceased.

SHEWFELT then met with attorney Cyril Walton and advised Walton that he wished to file a quiet title action on behalf of IMPERIAL LAND to the property which he had determined had been tax deeded to the state (R. T. 140-141). Walton advised SHEWFELT that he had had extensive experience in filing quiet title actions and suggested that several actions be filed rather than only one due to the extensive number of parcels involved (R. T. 620). The evidence conflicted as to whether or not Walton was aware that petitioners did not have an interest in all of the property to which they sought to quiet title. Walton denied having been advised of the lack of interest in petitioners (R. T. 179) and petitioner SHEWFELT testified that he did so advise attorney Walton (R. T. 620-630). The quiet title actions were prepared by Walton naming as defendants the last owners of record. Each complaint alleged that IMPERIAL LAND was the owner in fee simple of all the real property described in each respective complaint. The complaints were verified by SHEWFELT and filed in the Imperial

County Superior Court. At the time the suits were filed, IMPERIAL LAND had no interest in the various parcels of property which were described in the respective complaints (R. T. 186-89, 191-92, 690, 695-96). As to the first group of complaints filed, IMPERIAL LAND intended to get some color of title from an entity known as Ranch Development Company, which was a holder of wild deeds, outside the title chain, but the deal was never consummated (R. T. 176-77, 217, 666).

The named defendants in each respective complaint were not personally served, but were each mailed a copy of the complaint. At the time of these events, mailing was not an effective means of service under California laws (R. T. 190). Included with the complaint was a form letter which petitioners had prepared on stationery bearing the heading "Pacific Land Title Research Company", a fictitious name for IMPERIAL LAND, said fictitious name being duly filed in accordance with and pursuant to the California statutory requirements (R. T. 215, 341, 667-670, 672, 674, 246). The letter gave a legal description of the property concerned, stated that the property was delinquent for taxes since 1960 and was subsequently deeded in 1966 to the state of California, and that a tax title is paramount against all claims, with certain irrelevant exceptions. The letter then went on to state that in order for a title company to issue a policy of title insurance, a quiet title suit must be brought against, or a quit-claim or disclaimer obtained from all those claiming an interest in the property (R. T. 460-62, 542, 549; G. X. 13B, 15A, 26A). The letter stated that it was enclosing a disclaimer; and that if the addressee signed the disclaimer, he could ignore the quiet title complaint, and in addition would be paid a sum of money ranging in amount from $25 to $100.

From July 3, 1967, until the end of that year, eight such complaints were filed. Each of those eight complaints is a respective count charged in the indictment. Through the use of executed disclaimers, IMPERIAL LAND took judgment on two of the actions they had filed. Those defendants which filed an answer to the complaint had the action against them dismissed.

To refute the testimony of attorney Walton that he was not aware petitioners did not have an interest in the property in question, the evidence showed that whenever a defendant answered one of the complaints, Walton dismissed the action as to that party (R. T. 259, 270-71). Further, the evidence showed that Walton signed a stipulation to the effect that petitioner IMPERIAL LAND had no right, title or interest of any form or nature whatsoever in a portion of the property which was a subject of one of the complaints (R. T. 261-64; G. X. 36). In addition Walton made one appearance for petitioners in the Superior Court for Imperial County before Superior Court Judge Kirk in December of 1967. Despite the fact that petitioner SHEWFELT testified at that hearing, Walton introduced no testimony from petitioner SHEWFELT to show that he had any interest in the property. This is contrary to the testimony given by Walton during the trial of this case in the District Court (R. T. 231-32, 238-40, 254).

In 1968, petitioners secured the services of a new attorney, one Herman Ablon, who agreed to file quiet title actions in the name of IMPERIAL LAND, even though he knew his clients had no interest at all in most of the real property that was the subject of the complaints filed (R. T. 346, 671-673). These six complaints were the subject of the remaining six charges in the indictment. The format followed under the direction of attorney Ablon

was the same as that followed under attorney Walton. In addition, attorney Walton was asked to review the letter which bore the heading "Pacific Land Title Research Company" which accompanied the complaints (R. T. 332). Ablon testified that he was shown by petitioner SHEWFELT certificates of redemption and/or tax delinquency certificates to some of the property is involved in each complaint (R. T. 349-350). As to the letter bearing the fictitious name, "Pacific Land Title Research Company", Ablon approved same and suggested certain changes in said letter which were incorporated by the petitioners (R. T. 669-70).

Throughout the above two periods where the services of attorneys Ablon and Walton were utilized, attorney Dwain Tarbet was consulted for the purpose of petitioning for letters of administration where the owners of record of the real property involved in the respective quiet title suits were deceased (R. T. 397). Tarbet would petition the court for letters of administration to be issued in the name of either his secretary of that of petitioner SHEWFELT. Upon the petition being granted, he would then act as the attorney for the administratrix and file the requisite answer in the respective action (R. T. 398-400). Tarbet did not make a determination with respect to each petition as to the probable annual income of the property belonging to the deceased, nor did he investigate whether or not the decedent left a will, nor did he determine whether or not IMPERIAL LAND was the holder of the deed of the real property in the estate of the deceased. Said information was provided to him by petitioner SHEWFELT (R. T. 407-10).

The theory of the defense was that petitioners acted in good faith and relied on the advice of their attorneys. None of the acts charged in the indictment were done

prior to consulting with the attorneys involved. In this case, there was testimony as to every element of the advice of counsel defense. There was testimony from which the jury could have found that SHEWFELT contacted the attorneys in good faith (R. T. 619-20, 670). Also, from his testimony it appears that he made a full disclosure to them, that they were aware of what he planned to do, and that they approved of his activity (R. T. 619-621, 622, 624-25, 629-32, 669-70, 671-74, 681). See also R. T. 215. This testimony was fully supported by the testimony of Ablon, who indicated that he was aware of the letters that were mailed along with the complaint and, in fact, approved same. Ablon also was advised by SHEWFELT that the defendants did not have title to all property described in the complaints (R. T. 289-91, 295-96, 303-41, 346-47, 349-50, 374, 381). At page 681 of the Reporter's Transcript the following testimony of SHEWFELT is found:

"Q: Now, you described in the conversations that you had with Mr. Ablon about this process of these suits: you relied on Mr. Ablon, as an attorney in dealing with this?

A: Yes Sir.

Q: You've indicated that you were not advised by Mr. Ablon, or anybody in his firm, of any impropriety in this method of handling these cases; were you ever so advised by Mr. Walton or his partner?

Mr. Brannigan: I'll object.

The Court: No. I'll allow it.

The Witness: No." (Emphasis supplied.) (R. T. 681.)

Before the close of the evidence, defendants requested in writing, an instruction on the defense of good faith (Defendants' Instruction No. 4: C. T. 144; Appendix B) and also an instruction that reliance on the advice of counsel is an element to be considered in determining good faith (Defendants' Instruction No. 12: C. T. 153; Appendix C). The District Court told the trial defense counsel, at the conclusion of all evidence, that he would give, in his own words, all the requested instructions of the petitioners, excepting Requested Instruction No. 14 (which is not here relevant). Despite that statement by the District Court, the charge to the jury included only an instruction on good faith. At the conclusion of the charge to the jury, defense counsel specifically objected to the District Court's omission to instruct on the reliance on the advice of counsel. The District Court responded, in substance, that its instruction on good faith was sufficient to embrace both instructions. The District Court's instruction on good faith was as follows:

> "Now, the terms 'knowingly' and 'willfully' mean that a defendant must act voluntarily and purposely and not because of mistake or inadvertence or some other innocent reason. Untrue statements are not false unless they are made with knowledge that they are false and with intent to deceive.

> "In other words, if you find that an untrue representation was made by a defendant in good faith, or is the product of an innocent mistake of judgment, you must acquit him or it of the mail fraud charges, for an honest intent is always a defense to fraud." (R. T. 774.)

On appeal, the Court of Appeals affirmed the convictions and held that the petitioners were not entitled to the instruction on reliance on advice of counsel because "the evidence beyond question indicates that appellants retained counsel to secure the success of their mendacious scheme, not to secure legal advice."

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals misapprehended the events which transpired in the District Court with regard to the request by the appellants for an instruction on the reliance on advice of counsel. The District Court told the trial defense counsel, at the conclusion of all evidence, that he would give, in his own words, all the requested instructions of the appellants, excepting Requested Instruction No. 14 (which is not here relevant). By that statement, the District Court not only assured appellants that it would give the appellants' requested instruction on reliance on advice of counsel (Defendants' Instruction No. 12: C. T. 144: Appendix C) along with appellants' requested instruction on the defense of good faith but also impliedly agreed that both instructions were raised by the evidence and thereby warranted. It is significant to note that the government counsel interposed no objection to either instruction at the time of

their request or at any other time during the trial.

Despite the assurance by the District Court, the charge to the jury included only an instruction on good faith (Supra, p. 10). At the conclusion of the charge, defense counsel specifically objected to the District Court's omission to instruct on the advice of counsel. Again the District Court did not reply that the defense was not raised by the evidence and thereby not warranted, but rather replied that the charge of the court on the defense of good faith was sufficient to embrace both requested instructions. The response of the court to defense counsel's objection to the failure of the charge to the jury to include defendants' Requested Jury Instruction No. 12 was as follows:

> "The Court: I didn't use that in so many words, it's true. I did talk, I'm sure you'll agree, upon the good faith of the defense, but, however, I didn't use your words and you may have an exception." (Emphasis supplied.) (R. T. 781.)

The Court of Appeals in its opinion stated as follows:

> "Although requested to do so, the Court refused to charge the jury that reliance on the advice of counsel is an element to be considered in determining whether Imperial Land and Shewfelt had acted in good faith or with fraudulent intent." (Emphasis added.)

However, it is patently clear from the aforementioned recitation of the events in the District Court that in no

sense did the District Court refuse to so instruct. Rather, the District Court by its statement "I didn't use that in so many words . . . " believed that its charge, as given, was sufficient to embrace the requested instruction on advice of counsel. That statement of the District Court, coupled with the District Court's earlier assurance that all requested defense instructions would be given, made it abundantly clear that the trial court, after hearing all of the evidence, was convinced that the defendants were entitled to have the jury instructed on reliance on advice of counsel as an element to be considered in determining the good faith of the defendants. What prevented its inclusion in the charge was the misapprehension by the District Court that its instruction was sufficient to embrace the words set forth in the requested instruction. This is plainly error. See U.S. v. Phillips, 217 F.2d 435 (7th Cir. 1954); Williamson v. U.S., 207 U.S. 425 (1908); Hersh v. U.S., 68 F.2d 799 (9th Cir. 1934); Linden v. U.S., 254 F.2d 560 (4th Cir. 1958); Sachs v. U.S., 412 F.2d 357 (8th Cir. 1969); Shale v. U.S., 388 F.2d 616 (5th Cir. 1968); U.S. v. Diamond, 430 F.2d 688 (5th Cir. 1970).

II

The remainder of the Court of Appeal's opinion on the issue of whether the District Court erred in failing to instruct on reliance on the advice of counsel demonstrates a misapprehension of the precise issue before the court. The opinion of the Court of Appeals constitutes a justification by the court that the record supports a finding that the defendants did not rely on the advice of counsel since, according to the court, the defendants used the attorneys as instruments to effect their scheme. Petitioners do not here contend, by this petition, that

there is no evidence to support such a finding. But what petitioners here do assert is that the Court of Appeals has failed to consider that the defendants were entitled to have the jury make the determination, after appropriate instruction, that the Court of Appeals has made. The nexus of this petition is that the jury was not properly charged. It was for the jury to decide, not the Court of Appeals, whether petitioners acted in good faith for the purpose of seeking the services of their attorneys, whether petitioners made a full disclosure to their attorneys, and whether petitioners strictly followed the advice of their attorneys.

The opinion of the Court of Appeals commences with a recitation of a "well established legal postulate that a 'defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law, and which has some foundation in the evidence, however tenuous.' " United States v. Grimes, 413 F.2d 1376, 1378 (7th Cir. 1969); Charron v. United States, 412 F.2d 657 (9th Cir. 1969); Baker v. United States, 310 F.2d 924 (9th Cir. 1962), cert. denied, 372 U.S. 954 (1963). It is axiomatic that that postulate assumes that the evidence could be insufficient to support a finding in favor of the defendant and that the evidence may be "weak, insufficient, inconsistent or of doubtful credibility." See Tatum v. U.S., 190 F.2d 612, 617 (D.C. Cir. 1951). The Court of Appeals did not find that there was no evidence to warrant the requested instruction. What the Court of Appeals did do was to review the evidence and conclude that it did not, as a matter of law, constitute a defense. But in so doing the Court of Appeals has not only overlooked the critical question but it has invaded the bailiwick of the jury. Appropriate here is the statement of the court in U.S. v. Phillips, 217 F.2d 435 (7th Cir. 1954) at 442:

> "It is not the province of this court . . . to appraise the reasonableness or unreasonableness of the evidence relative to the advice of counsel theory."

The Court of Appeals' opinion is precisely contrary to the above admonition by the court in Phillips. The Appeals Court has assessed and weighed the evidence and concluded that the reliance on advice of counsel theory was unreasonable and a conviction is thereby supported by the evidence.

The obvious error is that it is the exclusive function of the jury to pass upon the credibility of the defense theory and not the appellate court. When the question of whether the defense was raised by the evidence was presented to the District Court, in both instances it was resolved in favor of the defendants. What prevented its inclusion in the charge to the jury was not the decision of the District Court that it was not appropriate but rather the misapprehension by the District Court that his "words" sufficiently embraced the words as set forth in the requested instruction.

The Court of Appeals' opinion affirming the convictions below not only disregards the decision of the lower court that an instruction on the advice of counsel was raised by the evidence but also disregards the testimony of the defendant that he relied on the advice of his counsel:

> "Q: Now, you described in the conversation that you had with Mr. Ablon about this process of these suits: you relied on Mr. Ablon, as an attorney in dealing with this?

A: Yes Sir.

Q: You've indicated that you were not advised by Mr. Ablon, or anybody in his firm, of any impropriety in this method of handling these cases: were you ever so advised by Mr. Walton or his partner?

Mr. Brannigan: I'll object.

The Court: No. I'll allow it.

The Witness: No." (Emphasis supplied.) (R. T. 681.)

III

The decision of the Court of Appeals in this case is in conflict with decisions of other courts of appeals in this case is in conflict with decisions of other courts of appeals on the question of when a defendant is entitled to get instruction on his theory of defense. The only condition to whether or not an accused is entitled to have the jury instructed on his theory of defense is that there be evidentiary support for such a theory. But this has been held satisfied in criminal cases

> ". . . even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." Tatum v. United States, 190 F. 2d 612, 617 (D. C. Cir. 1951) (quoting

53 Am. Jur., Trial, Section 580.)

See also, United States v. O'Connor, 237 F. 2d 466, 474 fn. 8 (2d Cir. 1956); United States v. Indian Trailer Corp., 226 F. 2d-595, 598 (7th Cir. 1955).

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

HILLYER & IRWIN

By: OSCAR F. IRWIN

Counsel for Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LEONARD R. SHEWFELT AND IMPERIAL COUNTY LAND COMPANY, Defendants-Appellants.	No. 71-2154

[February 9, 1972]

On Appeal from the United States District Court for the Southern District of California

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Before: WRIGHT and TRASK, Circuit Judges, and BYRNE,* District Judge.

BYRNE, District Judge:

At a jury trial, appellants Shewfelt and Imperial

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*Honorable William M. Byrne, Senior United States District Judge, Central District of California, sitting by designation.

County Land Company (hereinafter Imperial Land) were found guilty of 14 counts of mail fraud, violations of Title 18, United States Code, Section 1341. Shewfelt was sentenced to 14 two-year prison terms, the sentences to run concurrently. Imperial Land was fined $1,000 for each count upon which it was convicted for a total of $14,000. Finding against appellants on all issues raised, we affirm their convictions.

Viewing, as we must, the evidence in the light most favorable to the government, the following can be unraveled from this seemingly never-ending spool of trickery and deceit. The real property in issue is desert land located east of the Salton Sea in Imperial County, California. In the 1920s these lands were sold by a subsidiary of the Southern Pacific Railroad Company (the United States had granted these lands to the Southern Pacific at the turn of the century) to speculators who promptly sold them to the general public in sections of approximately ten acres each. In 1930 and 1931, Imperial County removed large areas of these lands from its tax rolls because the administrative cost of their taxation was greater than the income received therefrom. Thirty years later, in 1960, the tax rolls were reinstated. Largely due to deaths, sales and movings, most of the tax bills were returned, resulting in the tax delinquencies of such lands. Pursuant to California law,[1] the delinquent lands in 1966 were deeded to the state with the former owners or their successors in interest retaining a right to pay the delinquent taxes and thus redeem the property[2] any time

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1 California Rev. & Tax. Code, §3511.
2 California Rev. & Tax. Code, §4101.

prior to the disposition thereof by way of public auction.

In late 1966, Imperial Land, through its two shareholders, Shewfelt, a long time land speculator well versed in the intricacies of conducting title searches, and one Henry Hoffman,[3] instituted a systematic effort to determine (1) which of the lands in question were delinquent in their taxes and (2) the names and whereabouts of the last record owners or their heirs, in the event the last record owner had died. Having garnered this information from a host of sources (e.g. real property records of title companies, the Department of Motor Vehicles, the Bureau of Vital Statistics, as well as the files of funeral directors), the appellants stood ready to utilize this data to serve their devious ends.

Shewfelt met with attorney Cyril Walton for the purpose of filing a quiet title suit as to all of this "delinquent" land on behalf of Imperial Land. To be named as defendants were the last owners of record. Walton convinced Shewfelt that it would be more financially responsible "to file on a few parcels in separate actions." Thereafter, complaints verified by Shewfelt and Hoffman were filed in Imperial County Superior Court. These complaints were identical in format, each alleging that Imperial Land was the owner in fee simple of the real property described. In fact at the time these suits were filed, Imperial Land had no interest in these lands.

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3 The prosecution of Hoffman, who had been indicted as a co-defendant, was severed from that of appellants upon motion of the government. The last information made available to the court was that Hoffman's case had yet to come to trial.

Rather than personally serve the named defendants as required by the then existing state law, Shewfelt caused the complaints to be mailed. Included in the mailing was a form letter Shewfelt had prepared on stationery bearing the heading "Pacific Land Title Research Company," a pseudonym for Imperial Land ap- [sic] apparently used to convey the impression of authenticity by invoking the aura of a title company. The import of the letter was that Imperial Land held tax title, that the defendant had no interest in the property and that a costly lawsuit could be avoided and a nominal sum received (from $25 to $100), if the disclaimer which had been provided were executed.

From July 3, 1967, until the end of that year, eight such complaints were filed. Through the use of executed disclaimers, Imperial Land took judgment in two of the quiet title actions it had filed. Those defendants that filed an answer to the complaint had the action against them dismissed, often with prejudice. One defendant received a stipulated judgment in his favor.

In 1968, appellants secured the services of a new attorney, one Herman Ablon, who readily agreed to file quiet title actions in the name of Imperial Land even though he knew his clients had no interest at all "in most" of the real property that was the subject of the complaints he filed. Of the six complaints filed that year, Imperial Land took two judgments as a result of executed disclaimers.

The district court instructed the jury that a finding of untrue representations made in good faith would require rendering a verdict of acquittal. Although requested to do so, the court refused to charge the jury that reliance on the advice of counsel is an element to be considered in determining whether Imperial Land

and Shewfelt had acted in good faith or with fraudulent intent. Claiming to have never been advised as to any impropriety with regard to the lawsuits in question, appellants maintain this refusal constitutes prejudicial error.

The position advanced by the appellants is embedded in the well-established legal postulate that a "defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous." United States v. Grimes, 413 F. 2d 1376, 1378 (7th Cir. 1969); Charron v. United States, 412 F. 2d 657 (9th Cir. 1969); Baker v. United States, 310 F. 2d 924 (9th Cir. 1962), cert. denied, 372 U.S. 954 (1963). A seemingly extreme illustration of a court's willingness to invoke this settled rule is United States v. Diamond, 430 F. 2d 688, 694 (5th Cir. 1970), a case upon which the appellants rely. There, advertising copy promoting the sale of Arizona land was approved by the defendants' attorney. In compliance with New York law, the approved copy which had been created specially for that state, was free of any reference as to the availability of utilities. Although the tenuity of the evidence was acknowledged, it was deemed sufficient "to warrant an instruction in proper form as to reliance upon advice of counsel as a defense" because the contents of the defendants' promotional brochures served as the bases of the mail fraud charges brought against them.

In comparison to the facts of the instant case, the circumstances in Diamond must be viewed as compelling. Here, the evidence beyond question indicates that appellants retained counsel to insure the success of their mendacious scheme, not to secure legal advice. The attorneys in question merely implemented in the most

expeditious manner the plan concocted by their clients which preyed upon unsuspecting holders of interest in real property. It is noteworthy that it was Shewfelt who wrote the first form letter that was mailed to the initial group of defendants. The acknowledgment by Attorney Ablon, who "improved" Shewfelt's form letter, that he knew Imperial Land was without any interest in "most" of the lands which were the subjects of the complaints he filed in its behalf, underscores the fact that facilitation of appellants' scheme was the essence of the attorney-client relationship in controversy. Thus, here, unlike in Diamond, the attorneys did not unwittingly lead their clients down the road of crime. In this case, the clients acted as engineers who had sent out their workmen to remove any existing impediments. Under such circumstances it is irrelevant that appellants were never told of their impropriety. Legal assurance was not sought because acting within the framework of the law was not the reason appellants elected to deal with members of the Bar. Cf. United States v. Phillips, 217 F. 2d 435 (7th Cir. 1954), where the trial court's refusal to give a requested instruction as to advice of counsel was deemed reversible error because the evidence indicated that the defendant had acted pursuant to his attorney's advice when he reported his income in the manner which led to his indictment.

The trial court's rejection of another jury instruction propounded by the appellants is the subject of an additional assault upon the charge read to the jury. Specifically, appellants maintain that because the California courts have viewed the right of redemption as "nothing more than a personal privilege," the jury should have been instructed that the act of executing the disclaimers in question was wholly without any legal consequence. Absent the transfer of a proprietary interest, appellants assert the charges of mail fraud

flowing from this so-called "scheme" were entirely baseless. Had the jury been so instructed argue the appellants, a verdict of guilty would never have been returned.

Our reading of California law requires that we too reject the position advanced by the appellants. The redemption privilege which has been deemed "personal" enables the former owner or his successor in interest to divest the state of its title in the deeded property by paying all delinquent taxes prior to any authorized disposition. Glunt v. City and County of San Francisco, 274 Cal. App. 2d 269 (1969); Potter v. County of Los Angeles, 251 Cal. App. 2d 280 (1967). The "personal" limitation placed upon this privilege bars the transfer of title in the tax-deeded property to a "total stranger" whose only connection with the land is his payment of the outstanding taxes. People v. Lucas, 55 Cal. 2d 564 (1961); Mercury Herald Co. v. Moore, 22 Cal. 2d 269 (1943). As can be readily seen, with regard to real property which had been deeded to the state because of a delinquency in the payment of taxes, the holders of the privilege of redemption did indeed have an interest that was of value. If that were not true, it is open to question why experienced land speculators would spend months conducting careful title searches and orchestrating the institution of numerous quiet title actions.

The immediate goal of the elaborate plan devised by the appellants was to succeed to the interest held by the persons who were made defendants in the groundless lawsuits. In order to facilitate this goal, the appellants intentionally misrepresented to their unwitting victims that the victims had no interest in these lands and that execution of the disclaimers in question was the only alternative to financially draining lawsuits. In short,

the disclaimers were used as a means to deny the holders of the privilege, the opportunity to obtain clear title to the real property. The consequences thereof would be the appellants taking quiet title judgments by way of the executed disclaimers, thus enabling them to pay the tax deficiencies as successors in interest, not as "total strangers." Under such circumstances, we find no error in the trial court's refusal to charge the jury as requested by the appellants.

Over appellants' timely objection, attorneys Walton and Ablon were permitted to testify about communications with Shewfelt which clearly portrayed this appellant as the instigator of a "game plan" which if pursued with determination, would surely outwit unsuspecting victims of their interests in the lands now in issue. On appeal, appellants renew their contention that because these communications were confidential in nature, it was a "serious violation" of the attorney-client privilege, ergo prejudicial error to permit their disclosure.

The only impropriety relating to admission of these communications is the substance thereof. As noted, it is clear that the thrust of these attorney-client conversations was to effectuate a plan of fraud. Conversations of this sort are not accorded the sanctity of being deemed privileged. Petition of Sawyer, 229 F. 2d 805 (7th Cir. 1956), cert. denied 351 U.S. 966 (1956); Pollock v. United States, 202 F. 2d 281 (5th Cir. 1953), cert. denied, 345 U.S. 993 (1953); United States v. Bob, 106 F. 2d 37 (2d Cir. 1939), cert. denied 308 U.S. 589 (1939). Nevertheless, before the privileged status of these communications can be lifted, the government must first establish a prima facie case of fraud independently of the said communications. Union Camp Corp. v. Lewis, 385 F. 2d 143 (4th Cir. 1967); United

States v. Bob, supra. Here, as shown by the evidence set forth below, prior to the testimony of attorney Walton, the government had adduced substantial evidence proving falsehoods in the complaints and mailings which served as the bases of the charges brought against the appellants.

Pacific Title, over the signature "Leonard R. Shewfelt," had mailed letters to the record holders of interest enclosing summonses and quiet title complaints bearing captions showing plaintiff to be Imperial Land. The complaints were verified by Shewfelt and Hoffman and listed the law firms in which Walton and Ablon were partners. The letters, which stated that properties in which the addressees claimed an interest had been tax deeded to the State of California, implied that Imperial Land had acquired tax title and therefore paramount title to any interest of the addressees. The letters indicated that if the addressees signed the enclosed disclaimers, they could avoid a lengthy lawsuit, as well as receive a nominal compensation in return. Also, the government had established that as to two of the complaints (one filed by Walton, the other by Ablon) Imperial Land had no interest in the said properties, despite verifications to the contrary. [4]

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4 Appellants maintain that the government failed to meet its burden because, as they see it, "There was no evidence, prior to the testimony of Attorney Walton, that Shewfelt knowingly and consciously misrepresented that Imperial County Land Company had a fee interest in the property involved in each respective quiet title complaint." Implicit in this p sition is the view that

(Continued next page.)

Since the propriety of Ablon's testimony is predicated upon the same "independent" evidence (indeed, the government's case had been enhanced by the testimony of Walton and others prior to Ablon being called as a witness) we also sustain its admission.

In what can only be viewed as at best a pro forma gesture, appellants claim they have incurred substantial prejudice by the trial court's refusal to substitute counsel and to grant a continuance. The court refused on the ground that these motions were advanced solely to delay the trial proceedings. A panel of this court denied appellants' motion for a writ of mandamus ordering the substitution of counsel. Although they claim to have been prejudiced by the failure to substitute, appellants are unable to allude to even one example which might substantiate their claim. This is readily explained by the fact that able counsel (the very attorney who was the subject of the substitution motion) represented the appellants in so proficient a manner that he was the recipient of congratulatory praise from the trial judge.

Affirmed.

(4 continued)
the government must proffer direct evidence to establish the wilful misrepresentation. Such a view is not shared by the courts, for it is well settled that the element of wilful intent "may be inferred from the activities of the parties involved." Blachly v. United States, 380 F. 2d 665, 676, (5th Cir. 1967); Henderson v. United States, 202 F. 2d 400 (6th Cir. 1953). As can be readily seen, there was sufficient evidence in the instant case to make such an inference prior to the calling of attorney Walton to the witness stand.

APPENDIX B

GOOD FAITH AS A DEFENSE

Defendants have offered evidence of their good faith in making the representations alleged in the indictment. Good faith is a complete defense to the crime of mail fraud. In determining whether defendants acted in good faith or with the intent to defraud, the jury should consider all the facts and circumstances in the case. If the jury finds that defendants acted in good faith they should be found not guilty.

Manual on Jury Instr. in Fed. Crim. Cases, 7th Cir. Jud. Conf. Comm. on Jury Instructions - Judge Walter J. LaBuy, Chairman Section 16.03

APPENDIX C

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 12

ACTION ON ADVICE OF COUNSEL

The defendants claim that they are not guilty of willful wrongdoing because they acted on the basis of advice from their attorneys.

While it is true that the advice of an attorney is not of itself a defense to the crime of mail fraud, nevertheless it is an element to be considered in determining whether defendants acted in good faith or with fraudulent intent. Good faith, as I have already instructed you, is a complete defense to the crime of mail fraud.

If the defendants before taking any action sought the advice of an attorney whom they considered competent, in good faith and for the purpose of securing advice on the lawfulness of their possible future conduct, and made a full and accurate report to their attorney of all material facts of which they had the means of knowledge, and acted strictly in accordance with the advice of their attorney given following their full report, then the defendants would not be willfully doing (omitting) something the law forbids (requires), as that term is used in these instructions.

Whether the defendants acted in good faith for the purpose of seeking guidance as to questions about which they were in doubt, and whether they made a full and complete report to their attorney, and whether they acted strictly in accordance with the advice received, are questions for you to determine.

1 Devitt & Blackmar, Fed. Jury Instr.
Section 16.15 and Section 25.12

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SUPREME COURT, U. S.

No. 71-1157

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD R. SHEWFELT AND IMPERIAL COUNTY LAND COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioners were convicted on fourteen counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Shewfelt was sentenced to concurrent terms of two years' imprisonment, and petitioner Imperial County Land Company was fined $1,000 on each count. The court of appeals affirmed (Pet. App. A). The evi-

dence is summarized in the opinion of the court of appeals and need not be repeated here.

1. Petitioners' principal contention is that it was error for the district court not to give their requested instruction on good faith reliance on the advice of counsel since there was sufficient evidence to warrant the instruction. The court of appeals properly found this contention to be without merit (Pet. App. A4-A6).[1]

There was no indication in any of the testimony that petitioner Shewfelt or any representative of Imperial County Land Company went to any attorney and sought advice. Nor is there any evidence that Shewfelt or such other person received or followed any advice. Petitioner's testimony shows that he planned what he and his co-participant in the scheme would do, down to every detail, before they went to the lawyers; that they told the attorneys what they wanted done and the attorneys did it (Tr. 663-688).[2] As the court of appeals observed: "facilitation of [petitioners'] scheme was the essence of the attorney-client relationship in controversy" (Pet. App. A6).

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[1] Petitioners claim that the court of appeals did not find that there was no evidence to warrant the instruction, but, rather, that it erroneously assessed and weighed the evidence and concluded that the reliance on the advice of counsel theory was unreasonable (Pet. 14-15). However, a careful reading of the court's opinion and the cases cited therein do not substantiate this claim (Pet. App. A4-A6). The court of appeals failed to find "some foundation in the evidence however tenuous" (Pet. App. A5) warranting the instruction.

[2] "Tr." refers to the trial transcript.

Petitioners' claim that Shewfelt's own testimony supplied evidence that "he relied on the advice of his counsel" is unsupported by the record (Pet. 15).[2] At best petitioner Shewfelt's testimony shows that the attorneys involved remained silent when witnessing a course of action that was clearly fraudulent. This falls short of the evidence required for an instruction relating to the advice of counsel. See *Bisno* v. *United States*, 299 F. 2d 711, 719-720 (C.A. 9); see also, *Shale* v. *United States*, 388 F. 2d 616, 618 n. 2 (C.A. 5).

Absent evidence that petitioners made to an attorney a disclosure of the full facts and circumstances of the claim of Imperial County Land Company to the real property involved, actively seeking advice on the course of action to be taken, or that a course of action was proposed by an attorney, or that the specific action taken by petitioners corresponded to any advice of any attorney, that defense was not in the case. See *Bisno*, *supra*; *Shale*, *supra*.

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[2] The testimony relied on by petitioners to substantiate this claim is as follows (Tr. 681):

"Q. Now, you described in the conversation that you had with Mr. Ablon about this process of these suits; you relied on Mr. Ablon, as an attorney in dealing with this?

A. Yes Sir.

Q. You've indicated that you were not advised by Mr. Ablon, or anybody in his firm, of any impropriety in this method of handling these cases; were you ever so advised by Mr. Walton or his partner?

Mr. Brannigan: I'll object.

The Court: No, I'll allow it.

The Witness: No."

2. Petitioners submitted to the trial court a proposed instruction entitled "Action on Advice of Counsel" (Pet. App. C) and an instruction entitled "Good Faith as a Defense" (Pet. App. B). The trial judge told counsel, prior to instructing the jury, that he would follow their instructions "in my own words," with an exception not here relevant (Tr. 715). The district court then instructed the jury that a finding of untrue representations made in good faith would require rendering a verdict of acquittal (Tr. 774).[4] When the instructions were completed the court asked counsel if they had any objections to them (Tr. 780). Petitioners objected to the court's omission of their requested instruction on the advice of counsel as a defense (Tr. 780-781). The court stated that: "I didn't use that in so many words, it's true. I did talk, I'm sure you'll agree, upon the good faith of the defense, but, however, I didn't use your words and you may have an exception" (Tr. 781).[5]

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[4] The court instructed the jury as follows:

> Now, the terms "knowingly" and "willfully" mean that a defendant must act voluntarily and purposely and not merely because of a mistake or inadvertence or some other innocent reason. Untrue statements are not false unless they are made with knowledge that they are false and with intent to deceive.
>
> In other words, if you find that an untrue representation was made by a defendant in good faith, or is the product of an innocent mistake of judgment, you must acquit him or it of the mail fraud charges, for an honest intent is always a defense to fraud [Tr. 774].

[5] Petitioners subsequently filed a motion for a new trial asserting, *inter alia*, that it was error for the court to have

Petitioners contend that these facts show a determination by the district court that an instruction on the advice of counsel was warranted by the evidence, and that the court of appeals erred in disregarding that finding. However, the district court's comments above cannot fairly be said to have constituted any such determination. The fairest reading of the district court's comments is that it found the defense of good faith—and only that defense—raised by the evidence, and appropriately instructed the jury on that defense. The petitioner's argument that the district court's refusal to give a specific instruction on advice of counsel was based on a misapprehension that that instruction was included in the charge already given (Pet. 13) is nothing more than speculation and supposition. Hence, the court of appeals could properly examine the evidence and determine that the instruction was not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD.
Solicitor General.

MAY 1972.

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denied their requested instruction on the advice of counsel (Tr. 789). This claim again was considered by the district court and rejected (Tr. 790).

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